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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-893

A/S D/S SVENDBORG & D/S AF 1912 A/S,

Petitioners,

—against—

MARINE ENGINE SPECIALTIES CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Issues

Whether the Court of Appeals was warranted in reversing the holdings of the District Court against respondent as wholly unsupported by the evidence.

Whether the Court of Appeals properly ruled that the warranty of workmanlike performance was completely inappropriate on the evidence presented.

Whether the Court of Appeals properly held that there were no grounds for imputing the deceased's negligence to the respondent.

Evidence and Rulings on Trial

Marine Engine Specialties Corp. was a United States corporation with its place of business in the City, County and State of New York (67a, 70a).* This corporation was the East Coast Service Representative for Pacific Pump, the manufacturer of the marine pumps with which the t/t Evelyn Maersk was equipped on and before December 30, 1967. The t/t Evelyn Maersk was a Danish flag vessel which, during its maiden voyage on December 30, 1967, put into the port of Las Palmas, Canary Islands, in order to obtain a replacement of a defective feed pump (80-81a). The ship anchored about one-half nautical mile east of the harbor piers at about 5:30 a.m. (304-305a). At about 6:00 a.m. on the date of arrival the replacement pump was delivered by launch and lifted aboard with the ship's boom (22a, 100a, 305a-306a).

Meantime, Charles W. Nye, who was employed by the Marine Engine Specialties Corp. as a service engineer for Pacific Pump products, was instructed by his employer to go to Las Palmas and there to contact the agent of the t/t Evelyn Maersk (81a). There is no evidence to indicate that Marine Engine Specialties Corp. had the slightest knowledge of where the vessel was in the port. At 4:00 p.m. on December 30, 1967 the t/t Evelyn Maersk's chief officer was notified to expect the arrival of some type of an expert (333a, 404a). The Chief Officer had an accommodation ladder-pilot ladder arrangement set up for a gangway (333a, 404a). No man rope, intended to per-

* Figures in parentheses refer to trial appendix.

mit the boarder to steady himself getting on the pilot ladder (191a-192a), was rigged in this gangway (192a, 196a, 304a). Nor were boat ropes rigged to secure the launch alongside during transfer of the boarder (340a).

Sometime after 6:30 p.m. the Chief Officer was informed that Mr. Nye was approaching the ship in a launch (347a) just about the time that the ship was drawing in its anchor (349a), so that it was already underway (348a) and moving slowly (327a). When the launch arrived alongside, the ship made a lee (349a). There was then a 17- to 21-knot-per-hour north-northeast wind (232a, 307a) and the waves were from three to six feet in height (196a). The ship's log characterized the sea as pretty rough and somewhat heavy (405a-406a). It was dark at the time (175a-176a) but the ladder was illuminated by a cluster of lights and a spot light (343-344).

Although there were crewmen on deck with the Chief Officer when the launch came up (408a) at about 7:30 p.m., (351a, 378a) no member of the crew was stationed at the lower platform of the accommodation ladder to assist the boarder in climbing up the pilot ladder to the foot of the accommodation ladder (362a).

The launch had to make a number of passes at the ship before it could get close enough to effect transfer of the plaintiff's intestate (173a, 177a, 352a). Even with the lee created by the ship the waves were three feet high (176a). There was expert opinion that good seamanship required double boat ropes (177a, 189a-191a, 205a) and man ropes (192a, 251a) under existing conditions.

When Mr. Nye finally got onto and up two rungs on the pilot ladder, he stopped, cried for help and fell off into the water (359a, 360a, 379a-381a). A life ring was thrown to Nye (361a) which he grasped (255a-256a) but the crew member who held the line to which the ring was attached

never pulled it in. Except for playing an adis light on the water (385a-387a, 394a), lowering an aft boat ladder (373, 384) without having a crewman descend it (374a, 375a) and the Chief Officer's signalling the launch with his hands to come in closer (371a), no alarm was sounded (397a), no lifeboats were lowered (388a, 389a), no marker lights or life rings were thrown in the water (394a-395a) and nothing else was done in the form of rescue effort other than those of the crew who were on deck looking for Nye (388a, 389a) until 10:17 p.m. when the ship sailed out of the harbor (390a) without having found the man overboard.

The District Court found and held:

> "The ship was expecting a person of uncertain lay status, not a professional pilot, to board a rope ladder while the vessel was making a lee with waves as high as three to four feet. In these circumstances someone should have been on the platform of the accommodation ladder to be ready to lend a hand if necessary and a man rope and a boat rope should have been made available. The operating negligence of the crew rendered the vessel unseaworthy." (90a-91a)
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> • • •
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> "I find the vessel was unseaworthy for boarding in the circumstances and that the unseaworthiness was the proximate cause of the death." (91a)
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> • • •
>
> "But I also find that the shipowner was negligent in not supplying the safeguards mentioned in the cirstances." (91a)

Despite the fact that the late Charles W. Nye was a graduate marine engineer, the only testimony of his com-

petence or qualifications to negotiate his own transfer from launch to ship under the weather and sea conditions existing at the time here in issue was that he had and could be expected to have had no such training (276a-280a).

It was established that the deceased was obese and had a number of chronic ailments which would have foreshortened his life had he not met with this accident (494a-495a, 544a-545a). However, the only cause of death testified to was drowning (538a). Experts could not state that Mr. Nye had suffered a cardiovascular or cerebral accident (493a-494a, 540a, 549a) and there was no proof that any of his physical conditions were proximately related to the occurrence of this accident. Although it was said that Mr. Nye's condition prevented him from strenuous work over a long period of time (555a), the medical expert who gave that opinion would not state that he was a bad risk (545a). The only proof that Mr. Nye's condition had any effect on his ability to climb ladders was the testimony that once previously, after he had climbed a pilot's ladder, he was observed to be breathing hard (603a).

The ship's expert testified that if a ship's pump had to be replaced en route it is normally done by its crew (596a) and the only function of the guarantee engineer is to ascertain what went wrong with the old pump and to see that the new one was properly installed (589a). The plaintiff's expert testified substantially to the same effect (152a-155a).

The only negligence the District Court found against Marine Engine Specialties Corp. was that it ordered a man in Nye's physical condition to hazard a journey which could involve climbing into a vessel at sea (93a-94a).

POINT I

The rulings of the Court of Appeals as to the conclusions of the District Court were correct.

The findings of the District Court, that the ship was negligent in the inadequate and inferior facilities it afforded for the deceased's protection in obtaining access to it, was not disturbed by the Court of Appeals.

However, there was no evidence in this case from which any inference could be drawn that Marine Engine Specialties Corp. could have known or anticipated that the ship to which it sent Nye thousands of miles away would require him to board that vessel from a launch while the ship was underway in a rough and heavy sea with winds from 17 to 21 knots per hour, waves from 3 to 4 feet and without the ship having supplied any of the necessary safeguards called for under the existing circumstances. The District Court held that the ship should have provided a means of access suitable for the safe boarding of "a person of uncertain lay status". Nye's employer was entitled to expect that no matter where the ship was located and what the weather conditions were when Nye came to it, the ship would provide its employee with a reasonably safe method of boarding. This the District Court held was the ship's obligation (91a). The existing sea conditions at the time of boarding were unpredictable by this respondent and the commensurate measures to be taken by the ship to assure safe access were wholly and solely within the ship's subjective decisional and operational process.

Nor is there any proof on the record from which a finding could be made that Nye, for all his obesity and ailments, could not transfer from a launch and climb a pilot's ladder under normal conditions or that he could not have effected transfer here if the proper safeguards had been

provided or that he could not do his designated job aboard of overseeing the crew's installation of the new feed pump. The medical experts did not attribute any of his physical conditions as having caused or contributed to Nye's accident. The most that a fact witness could say was that on a previous occasion Nye had to stop and catch his breath after having climbed a pilot's ladder all the way from launch level up to the main deck of another ship. Where is there any proof from this of the negligence of the employer in supplying an inadequate person for his intended purpose?

It is submitted that the District Court had no foundation in evidence for its conclusion that Marine Engine Specialties Corp. was negligent in ordering a man of Nye's condition to hazard a journey which would involve climbing onto a vessel at sea. As the Court of Appeals held, the only proof shows that the ship alone was negligent in unforeseeably forcing Nye to board in the middle of what was tantamount to a storm without providing him with adequate facilities and safeguards to do so. That situation, by any stretch of the imagination, could not, on the evidence in this case, have been anticipated by Nye's employer.

Even by the strictest construction of the cases cited in petitioner's brief setting forth the "unless clearly erroneous" rule, the Court of Appeals was well warranted, indeed it was mandated, in reversing the District Court's conclusion.

POINT II

The Court of Appeals properly held that by any application of law the ship was not entitled to a warranty of workmanlike performance from respondent.

The very entranceway to the ship, before Nye could ever come up to it, was already rendered dangerous and defective by the ship itself in the negative conduct of its crew and its flagrant failure to provide minimal safe access facilities. This was found by the District Court and confirmed in the Court of Appeals.

Thus, without any opportunity on the part of Nye or his employer to take control of or to touch any part of the ship or to assume any duty to the ship, the ship breached its duty of providing him with a safe means of access (*Superior Oil Company* v. *Traham*, 322 F. 2d 234, 235 [5th Cir. 1963]). The employer of a person to do work aboard ship cannot be charged with a breach of warranty of workmanlike performance where it could not reasonably be found to have had an opportunity to discover the dangerous condition created by the ship so as to be charged with an obligation to correct or minimize the possibility of accident (*Calderola* v. *Cunard Steamship Co.*, 279 F. 2d 475, 478 [2nd Cir., 1960]). The rule *Italia Societa* v. *Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 323 (1964) relied upon by petitioner is readily distinguishable since the injury-producing and defective condition here was created by the ship, it existed in place before Nye ever came to the ship and it was never under the control or supervision of Marine Engine Specialties Corp. The means of access was the creation solely of the ship and it alone had the power to minimize the risk, not Marine Engine Specialties Corp. which could not even know what access accommodations were provided.

Also, the ship's conduct here, in actively preventing the Marine Engine Specialties Corp. not only from being able to do a workmanlike job, but also from having its employee *even start to come aboard* safely, was such as to preclude said ship from being entitled to a warranty of workmanlike performance (*Weyerheuser S.S. Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563, 567 [1958]; *Albanese* v. *N.V. Nederl. Amerk., Stoom.* v. *Maats, etc.*, 346 F. 2d 481 [2nd Cir., 1965]).

In addition, since Nye was not to perform any duty traditionally done by seamen, he was not entitled to the warranty of seaworthiness from the ship. It follows, therefore, that the ship should not be entitled to a warranty of workmanlike performance from Marine Engine Specialties Corp. (*Schwartz* v. *Compagnie General Transatlantique*, 405 F. 2d 270, 276 [2nd Cir., 1968]; *Hobart* v. *Sohio Petroleum Co.*, 445 F. 2d 435, 438-439 [5th Cir., 1971]; *Davis* v. *Chas. Kruz & Co., Inc.*, 483 F. 2d 184, 187-188 [9th Cir. 1973]). It is submitted that the District Court's characterization of Nye's function aboard ship to be that of a repair man was the product of rationalization without any foundation in proof.

Accordingly, whatever theory of law is to be applied to the proof in this action, the Court of Appeals was correct in holding as a matter of law that the ship here was not entitled to the warranty of workmanlike performance from Marine Engine Specialties Corp.

POINT III

The Court of Appeals properly found that the ship was not entitled to indemnity from Nye's employer, even though Nye was held contributorily negligent.

Since no warranty of workmanlike performance was owed by Marine Engine Specialties Corp. to the ship, there can be no *per se* imputation of the negligence of Nye to his employer (*Loffland Brothers Company* v. *Roberts*, 386 F. 2d 540, 549-550 [5th Cir. 1967]). The ship had the burden of proving the elements of Marine Engine Specialties Corp.'s own negligence proximately related to its employee's accident in order for the ship to be entitled to indemnity against it. The proof showed conclusively that Marine Engine Specialties Corp. was not in any way negligent.

The petitioners have conceded the correctness of the holding of their own fault in reference to the Nye accident by not addressing their application for a writ of certiorari to that element of the judgment. The extent and character of the part which the ship played in the death of Charles W. Nye, as seen from the proof, amounted to a flagrant abandonment of every duty it owed to afford the deceased a safe means of access. However, the petitioners now make vain attempts by a voluminous argument and by the offer of selective self-serving excerpts from decisional law to persuade this Honorable Court that the perfectly proper determination of the Court of Appeals was somehow defective, in order to relieve themselves of the consequences of their sole fault which every realistic concept of maritime law demands the said petitioners should bear. This injustice should not be allowed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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